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C O N F I D E N T I A L SECTION 01 OF 02 THE HAGUE 002494

SIPDIS

DEPARTMENT FOR S/WCI - PROSPER/RICHARD, EUR - STEPHENS,
EUR/SCE - GAUDIOSI/GREGORIAN/MITCHELL, L/EUR - LAHNE, L/AF
- GTAFT. INR/WCAD - SEIDENSTRICKER/MORIN; USUN FOR
ROSTOW/WILLSON

E.O. 12958: DECL: FIVE YEARS AFTER ICTY CLOSURE

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY - MILOSEVIC TRIAL ADJOURNS IN DISARRAY
FOLLOWING IMPOSITION OF COUNSEL

Classified By: Clifton M. Johnson, Legal Counselor, Reason 1.5(b)-(d).

[11.](#) (C) Summary. The defense phase of Slobodan Milosevic,s trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) stumbled into a new set of obstacles during the week of September 13. The trial chamber abruptly transformed the defense from one led exclusively by Milosevic to one where imposed counsel was instructed to lead direct examination of all defense witnesses, with only a subsidiary role for Milosevic. This has led to a test of wills and another crisis, with the accused refusing to engage the proceedings and denouncing the trial as a show. Witnesses Milosevic intended to call are now staying away from the proceedings in droves, expressing outrage at the trial chamber,s refusal to allow Milosevic to conduct his own defense. Assigned counsel Stephen Kay has been left with a dwindling supply of witnesses, an uncooperative client, and the task of putting together an entirely new defense approach. With members of the prosecution team suggesting that the case could sputter to a conclusion before the end of the year, the trial chamber recessed the case for one month (until October 12) to allow Kay to get his case together. End summary.

[12.](#) (SBU) The second week of Milosevic,s defense case began with the issuance of a September 10 chamber decision allowing the defense counsel to appeal immediately their own appointment. Lead Prosecutor Geoffrey Nice told Embassy legal officers that he expected a quick decision from the Appeals Chamber. Prosecutors and observers alike expect the Appeals Chamber to affirm the trial chamber,s decisions on counsel.

[13.](#) (SBU) With newly-assigned counsel Stephen Kay conducting the defense,s examination in chief, the second week of the Milosevic defense saw only one witness, bringing to three the total number of witnesses examined during the two weeks of the defense case. Kay examined retired Canadian army captain Roland Keith, who was in the Glogovac and Kosovo Polje areas as part of the OSCE Kosovo Verification Mission in February and March 1999. Milosevic sat behind, as usual, showing evident displeasure. Kay endeavored to show that Kosovo Liberation Army (KLA) responsibility for offenses during the conflict in Kosovo. Keith,s testimony was hardly persuasive. For instance, the centerpiece of his examination involved an incident in which he believed KLA members instigated an attack against a routine police patrol on the Pristina-Pec road, though he stated he was not present when the clash started. Nice later told us that Keith,s testimony had been almost "embarrassing" since he could only speculate that the attack was initiated by the KLA. Further, the testimony was based on Keith,s few weeks in a small patch of the region and contradicted detailed, published reports by higher-ranking members of the OSCE Kosovo Verification Mission who had a deeper involvement in the project and region.

[14.](#) (C) Lacking additional witnesses (and evidently a real defense strategy), Kay sought a postponement in the case. He requested that the trial be adjourned until the Appeals Chamber ruled on the issue of assigning counsel to Milosevic. He further urged the court to grant two defense requests: (1) that Milosevic have another medical examination, and (2) that Milosevic essentially reverse roles with Kay, so that Milosevic would conduct the defense,s examination in chief. The court rejected both requests, pointing out that Milosevic,s health was the reason for the imposition of counsel; Presiding Judge Robinson repeatedly asked Kay what would happen when Milosevic,s health "breaks down." Kay continued to press, arguing Milosevic,s right to conduct his defense and bringing up very candidly the difficulty Kay is having with his uncooperative client. He stressed that, unable to represent Milosevic adequately, he was concerned about the consequences for a fair trial. Comment. In rejecting Kay,s reasonable request, the trial court further boxed itself in to an approach that all but ensures Milosevic,s nonparticipation. End comment.

[15.](#) (U) On the issue of uncooperative witnesses, the court told Kay he needed to demonstrate that the witnesses would

not testify. Kay responded that of 23 witnesses recently contacted, 20 had already refused to appear. The court then suggested that Kay subpoena the witnesses and, dismissing Kay,s objection that it would ultimately require hundreds of subpoenas, told Kay to begin the process so that he could demonstrate to the court that compelled witnesses would not appear. Milosevic himself contributed to the current conflict over witness participation, reading from letters from former State Department FRY desk officer George Kenney and former Canadian ambassador to Yugoslavia James Bissett. Kenney, according to the accused, wrote that "I . . . still believe that you are innocent of all the charges," but that because the Tribunal took away "your fundamental right to represent yourself . . . the proceedings have become inherently unfair, amounting to no more than a political show trial with no authentic legal legitimacy." Bissett, again according to Milosevic, wrote that "the proceedings have taken on all of the characteristics of a Stalinist show trial. I do not want to be part of this travesty of justice."

16. (SBU) The Trial Chamber, facing a crumbling to non-existent defense, finally ruled that the trial would recess for four weeks. It did not base the hiatus on the status of the appeal but rather offered the break so that the defense counsel could prepare his examination of more witnesses and a longer-term defense strategy. The trial will continue on 12 October, barring any further interruptions.

17. (C) Comment: While warmly welcomed by the Prosecution, the Chamber,s decision to not only impose counsel on Milosevic but to also strip him of any leading role in his defense is quickly proving to be a serious miscalculation. Although the decision addressed the disruptions caused by Milosevic,s recurrent health problems, it did so by introducing a new and perhaps more fundamental concern about the fairness and credibility of proceedings. How this will play out will not become clear until the trial resumes on October 12. Under a positive scenario Milosevic would reengage the proceedings because he cannot keep himself away from his stage or the appointed counsel would pull together a credible defense to offer in Milosevic,s absence. A more likely and negative scenario is of Milosevic absenting himself from the trial and having it limp to a close in a few months with only a thin defense having been advanced. While ICTY watchers would condemn (with considerable merit) the result of such a truncated trial as unfair, it will also be clear to all that Milosevic brought it upon himself. Moreover, few may care as Milosevic,s saga has become yesterday,s news and both his supporters and detractors would not be surprised to see him convicted. The most immediate impact on the USG may be a trial court that is less obliging of efforts to deflect the testimony of U.S. officials requested by the defense. The longer term impact will likely be seen when the success of the ICTY is assessed and its model considered for the trial of future war criminals. End comment.

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